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Supreme Court of the United States

OCTOBER TERM, 1967

NO. ——

DAN W. DREW,
Petitioner

versus

RUFUS B. LAWRIMORE, T. B. CUNNINGHAM and J. B. COOK, as the Marketing Quota Review Committee, Area of Venue No. 5, State of South Carolina, of the United States Department of Agriculture; ORVILLE L. FREEMAN, Secretary of Agriculture of the United States of America; PAUL W. KOWALSKI, CHARLES E. CALHOUN, MILLS P. TUTEN and C. B. PLAYER, JR., as the State Agricultural Stabilization and Conservation Committee for the State of South Carolina of the United States Department of Agriculture; and J. EVAN GOODYEAR, PAUL RICHARDSON and W. F. PAGE, as the County Agricultural Stabilization and Conservation Committee for Marion County of the United States Department of Agriculture

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. N. Zeigler, Attorney, on behalf of Dan W. Drew, petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 19, 1967.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 1a-8a) is reported at — F. 2d —. The initial Order of the Honorable Robert W. Hemphill, Judge of the United States District Court for the District of South Carolina, dated August 25, 1966, is reported in 257 F. Supp. 659 and is printed on page 3a of the Appendix for the Appellants. Judge Hemphill's subsequent Orders dated September 12, 1966, and November 18, 1966, are to be found in the Appendix for the Appellants at pages 44a and 52a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1967 (App. B, infra, p. 9a). On July 28, 1967, Chief Judge C. F. Haynsworth entered an Order dated July 28, 1967, staying the issuance of a certified copy of the judgment of the Court pending application for a writ of certiorari (App. C, infra, p. 10a). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED

Where statutory review is sought under the provisions of 7 U.S.C.A. 1365 and 1366, is the United States Department of Agriculture bound by the record taken before its Review Committee and certified to the District Court as to issues joined and tried in those proceedings?

Is the Appellee Dan W. Drew denied due process of law under the Constitution of the United States of America by the Court of Appeals' reversal of the Order of the District Court where the Court of Appeals makes findings of fact based on unsworn state-

ments and representations made outside the review record prescribed by statute?

STATUTES AND REGULATIONS INVOLVED

The Federal statutes and regulations involved in this case are collected in Appendix D, infra, pp. 11a-18a.

Central to the issues presented are the provisions of the Soil Conservation and Domestic Allotment Act of 1935, as amended, and the Agricultural Adjustment Act of 1938, as amended, insofar as they set up a system for administering flue-cured tobacco acreage allotments and marketing quotas. Of particular importance are the provisions of the Soil Conservation and Domestic Allotment Act of 1938 contained in 16 U.S.C.A. 590g, and 16 U.S.C.A. 590h (b). These provisions are supplemented by 7 U.S.C.A. 1365 and 7 U.S.C.A. 1366, which establish a system of appeals for farmers dissatisfied with determinations made by the various committees established in regulations issued by the Secretary of Agriculture.

Although all relevant statutes and regulations are printed in the Appendix this case deals primarily with the portion of the Agricultural Adjustment Act of 1938, as amended, as follows:

7 U.S.C.A. 1366. *Court review.*

> The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce

such evidence in the hearing before the review committee, the court may direct such additional eivdence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplimented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.

STATEMENT

A. The Statutory and Regulatory Program

This case, involving the determination of a tobacco farmer's acreage allotment and marketing quota, requiring the interpretation of the statutory and regulatory administrative program contained in the Agricultural Adjustment Act of 1938, as amended, and those parts of the Soil Conservation and Domestic Allotment Act of 1935, as amended, which deal with the creation of administrative areas within the states [16 U.S.C.A. Sec. 590g and Sec. 590h (b), App. D,

infra, pp. 13a-14a]. The program of tobacco allotments is administered by the Secretary of Agriculture through a committee system which came into a unified structure through a combination of the provisions of the two Acts.

In point of time, the Soil Conservation and Domestic Allotment Act of 1935 came first. Its general purposes are set forth in 16 U.S.C.A. 590g. Sec. 590h (b) (App. D, infra, pp. 13a-14a) directs the Secretary of Agriculture in carrying out the provisions of the Act to utilize the committees which are set up in subsequent portions of the section. These committees were initially the State Committee, the County Committee, and local or "community" committees. The Secretary of Agriculture is given the power to make regulations governing these committees and to regulate the agricultural programs through them. The review committee was first created under provision of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. 1363 (App. D, infra, pp. 18a-19a). Court review of decisions on allotments are provided for in 7 U.S.C.A. 1365, and the nature and scope of court review is provided in 7 U.S.C.A. 1366 (App. D, infra, pp. 11a-12a). It is admitted by the defendant Department of Agriculture that its agents failed to establish community boundaries as required by statute and regulations.

B. Statement of Facts

This action arises because of the failure of the Department of Agriculture, acting through its various agencies, to determine community boundaries in Marion County, South Carolina, as required by law for the administration of the government's tobacco program. The effect of the failure to establish physi-

cal boundaries for local administrative areas known as "communities" did not become important until 1965 when the acreage poundage amendment to the Agricultural Adjustment Act of 1938 was passed. 7 U. S. C. A. 1314 (Supp. 1366) (App. D, p. 15a). Mr. Drew, a large tobacco farmer, whose address is Route 1, Mullins, South Carolina, and whose voting precinct is South Mullins, lives in an area where three "communities" corner midway between the Town of Marion and the Town of Mullins. If his community designation is "Marion Community" then he would have approximately ten thousand (10,000) pounds less tobacco allotment than if his community designation was either "Rains Community" or "South Mullins Community."

Drew was unable to get either the local Agricultural Stabilization and Conservation Office, in Marion County, hereinafter referred to as the Marion County ASC Office, or the State Agricultural Stabilization and Conservation Office, hereinafter designated as State ASC Office, to locate any physical boundaries separating Marion, South Mullins and Rains Communities. His remedy as a tobacco farmer dissatisfied with his marketing quota is clearly defined by statute [7 U.S.C.A. Section 1365 (App. D, infra, p. 11a)].

C. Proceedings Before ASC Review Committee

In due course a hearing was held before the Review Committee in Marion County on June 26, 1966. At that hearing the Defendant Marion County ASC Committee appeared and answered, denying "vehemently" that they or "The State Committee acted arbitrarily, capriciously, or in abuse of discretion in fixing community boundaries * * *." It is clear from

the record taken before the Review Committee that the Marion County and State ASC Committees as parties to the proceedings before the Review Committee produced no evidence of a map showing community boundaries, offered no evidence to support any rational administrative policy for placing the Drew farms in Marion Community and offered no evidence to rebut the scientific evidence offered by Drew's witnesses.

It was the position of Drew that the purposes stated in 16 U.S.C.A. 590g (App. D, infra, pp. 13a-14a), establishing as the policy of the law the "promotion of economic use and conservation of land," and the "diminution of exploitation and wasteful and unscientific use of national soil resources," were controlling and that the Secretary of Agriculture, in establishing community boundaries under the authority of the Soil Conservation and Domestic Allotment Act of 1935, was bound by these provisions.

The Review Committee took a patently arbitrary attitude toward the testimony offered by Drew to show the natural features of Marion County which should be used as a basis for determining where community boundaries should have been located in December, 1965, at the time his tobacco acreage allotment and marketing quota for 1966 were determined by the Marion County ASC Committee. The Review Committee foound as follows: "* * * [T]here is *no provision*, either in the Acts of Congress, or the Regulations promulgated by the Secretary of Agriculture, that provides for *any consideration* to be given to scientific or geological analysis of the soil in the determination of commnity boundaries for administrative purposes," (Emphasis supplied).

The Review Committee's findings of fact and law were adverse to Drew, and suit was filed in the United

States District Court for the District of South Carolina in accordance with the provisions of 7 U.S.C.A. 1365 (App. D, infra, p. 11a).

D. Proceedings Before United States District Court of South Carolina

Action was brought in the United States District Court for South Carolina for judicial review against the Appellants who represent the United States Department of Agriculture in various capacities with regard to the administration of acreage-poundage marketing quotas for flue-cured tobacco in South Carolina. Two interrelated causes of action are stated in the complaint. The first cause of action is one for review of the decision of the Marketing Quota Review Committee, Area of Venue No. 5, State of South Carolina, of the United States Department of Agriculture. The action is controlled by the provisions of 7 U.S.C.A. 1365 and 1366. The second cause of action is brought against the Secretary of Agriculture of the United States, the State Agricultural Stabilization and Conservation Committee for the State of South Carolina of the United States Department of Agriculture and the County Agricultural Stabilization and Conservation Committee for Marion County of the United States Department of Agriculture. It is in the nature of mandamus in which is sought specific performance of the Agricultural Adjustment Act of 1938, as amended, the Agricultural Act of 1949, as amended, and other related Acts, as well as a declaration of Appellee's rights under these laws. It is brought under the provisions of 7 U.S.C.A. 1376 (App. D, infra, pp. 12a-13a) and 28 U.S.C.A. 2201 and 1361 (App. D, infra, p. 19a).

A Rule to Show Cause why the Appellants should

not be required to establish boundary lines between the communities in Marion County as required by law was issued, and a hearing on this rule was had on August 17, 1966. Thereafter, on August 25, 1966, the Honorable Robert W. Hemphill, United States District Judge, issued an Order requiring the Appellants "to determine boundaries as and if established in December, 1965, for Marion, South Mullins and Rains Communities in Marion County, South Carolina, as required by law and regulations issued pursuant thereto, giving full consideration to the provisions of *16 U.S.C.A. 590g (a)* and such relevant physical, scientific and economic facts established in *the record of the hearing before the Marketing Quota Review Committee, * * * held on June 22, 1966*, and filed with this Court on August 12, 1966, as may have affected the use and conservation of plaintiff's land and others similarly situated." (Emphasis supplied).

The representative of the Department of Agriculture in disregard of the clear meaning of the Order of the Court, filed in the Court a map showing community boundaries different from any which they had endeavored to establish before the Review Committee and identical with a map which had been previously submitted to the District Court at the hearing on the Rule to Show Cause and which had been specifically refused by the District Court in its Order dated August 25, 1966. The District Court acting upon various motions issued an Order dated September 12, 1966, in which the actions of the defendants were found not to be in compliance with the previous Order of the Court and in which the defendants were directed to comply with the previous Order of the Court and establish boundaries upon the record certified to the District Court. At this point, the State ASC Committee had endeavored to file with the Court

a document entitled "Determination in Compliance With the Order of the Court Filed on August 25, 1966." This document was not filed with the Review Committee nor served upon counsel for Drew. It was signed by both the State ASC Committee and the Marion County ASC Committee. It purports to make determination of community boundaries upon evidence not produced at the hearing before the Reviaw Committee and evidence which if it had been offered before the Review Committee would have been inadmissible as hearsay. It establishes boundary lines completely different from those which the Department of Agriculture's witnesses endeavored to establish by sworn testimony at the hearing before the Review Committee.

Acting upon various motions and after hearing oral arguments the District Court refused to accept the actions of the defendant Department of Agriculture and issued an Order dated September 12, 1966, in which the actions of the defendants were found not to be in compliance with the previous Order of the Court and in which the defendants were directed to comply with the previous Order of the Court and make a determination upon the record before the Review Committee as required by 7 U.S.C.A. 1366. Compliance having been obtained by a redetermination of the Review Committee filed September 16, 1966, and the answer of the appellants having been filed, various motions were made by Appellants and by Appellee.

The Department of Agriculture filed various motions to vacate the Order of September 12, 1966, and in addition requested a hearing. Petitioner Drew having filed motion and suggestion of mootness, the Court by Order dated November 18, 1966, found that

the actions of the Appellant in complying with the Orders of the Court had given the Appellee the relief sought in his second cause of action and had rendered moot the first cause of action. Judgment in favor of Drew was filed on December 19, 1966.

From these three Orders of the District Court the representatives of the Department of Agriculture appealed to the Court of Appeals for the Fourth Judicial Circuit.

E. Proceedings in the Court Below

In the briefs filed by the Department of Agiculture and in oral argument before the Court of Appeals for the Fourth Judicial Circuit, the Department took the position that they did not challenge the portions of the District Court's Order setting aside the original determination of the Review Committee and directing the drawing of new boundary lines. The thrust of the appeal was directed only at those portions of the Orders of the District Court of August 25, 1966, September 12, 1966, and November 18, 1966, which required that the Department of Agriculture's agents draw the community boundaries on the evidence taken before the Review Committee and according to the Department of Agriculture's argument, on the basis of "technical natural resource factors having nothing to do with efficient administrative practice in the drawing of the new boundaries."

The position of Drew in the Court of Appeals was that the general policies stated in the Soil Conservation and Domestic Allotment Act of 1935, 16 U.S.C.A. 590g, were binding upon the Secretary of Agriculture and that the establishment of community boundaries under the provisions of 16 U.S.C.A. 590h (b)

required that the Secretary and his agents place "technical natural resource factors ahead of "administrative practice" especially in view of the enactment of 7 U.S.C.A. 1314c which, for the first time, made natural resource factors as defined in 16 U.S.C.A. 590g, economically significant to tobacco farmers. It was also the position of Drew that the provisions of 7 U.S.C.A. 1366, defining the area of Court review, were binding upon the agents of the Secretary of Agriculture and that they were not free to determine, *de novo* and *dehors* the record on file with the District Court, the very issue which had been litigated before the Review Committee and which they admitted was properly decided adversely to the Department of Agriculture.

The Court of Appeals in its decision dated June 19, 1967, reversed the District Court's decision in favor of Drew. The opinion side-stepped the issue of the effect of the language contained in 16 U.S.C.A. 590g stating that, while there was no need to decide this question, in exercising judicial restraint the Court "in no way approve the position of the District Court that natural resource factors are to be given controlling weight in determining the boundaries of local administrative areas." (App. A, infra, p. 6a).

The issue of the binding effect of the record made before the Review Committee which formed the only basis of the proceeding before the District Court under the provisions of 7 U.S.C.A. 1365, 1366 (App. D, infra pp. 11a-12a) was decided adversely to Drew. But the Court of Appeals went further. Without regard for the fact that the issue of arbitrary and capricious action on the part of the State and Marion ASC Committees constituting abuse of discretion had been raised and argued in the proceeding before the

Review Committee and made an issue in the pleadings in the District Court, the decision of the Court of Appeals finds that the document filed by the Department of Agriculture with the District Court but rejected by it, which had not been filed with the Review Committee or served upon counsel for Drew, "contained no abuse of discretion by the defendants in the present case" but constituted "a deliberate and well-reasoned determination." Thus according to the reasoning of the Court of Appeals, the lengthy administrative and judicial procedure prescribed by the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C.A. 1363, 1365, and 1366, could only furnish Drew a Pyrrhic victory.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The Court of Appeals for the Fourth Circuit has failed to construe correctly a clear statement of Congressional purpose and intent contained in 16 U.S.C.A. 590g (a).

The interlocking system of committees appointed to administer the Agricultural Adjustment Act of 1938, as amended, has been previously explained. These committees are organized under the provisions of the Soil Conservation and Domestic Allotment Act of 1935. The initial provisions of that Act give a clear, unambiguous statement of Congressional intent. [See 16 U.S.C.A. 590g (a), App. D, infra, p. 13a]. It is the duty of the courts to give effect to the Congressional policies stated in 16 U.S.C.A. 590g (a). *Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Railway Co.*, 174 F. 2d 641 (8 Cir. 1960). This is particularly true when the effect of ignoring this clear statement of Congressional pur-

pose results in severe economic hardship for Drew, as a matter of fact, wasteful overproduction which according to the testimony necessitated the destruction in 1965 of six thousand (6,000) pounds of tobacco. The necessity for a construction of the interrelationship between the purposes stated in 16 U.S.C.A. 590g (a) of the Agricultural Adjustment Act of 1938, as amended, only became a matter of critical economic concern in 1965 with the passage of an amendment to the Agricultural Adjustment Act contained in 7 U.S.C.A. 1314c (a). (App. D, infra, p. 15a). Other farmers will be similarly affected.

It is significant that 7 U.S.C.A. 1314a (5) specifically refers to the local administrative areas created under the provisions of 16 U.S.C.A. 590h. The Court of Appeals of the Fourth Circuit, it is respectfully submitted, refused to give controlling effect to the provisions of 16 U.S.C.A. 590g (a) in establishing a basis for determining the reasonableness of the Department of Agriculture's actions in determining community boundary lines in Marion County, South Carolina, which affected Drew's acreage allotment and marketing quota for the crop year 1966.

2. The appeal procedure established in the Agricultural Adjustment Act of 1938, as amended, has never been passed upon by the United States Supreme Court, and the interpretation of the Court of Appeals for the Fourth Circuit of the lack of binding force of the record in these proceedings is incorrect and would deny Drew due process of law under the Constitution of the United States of America.

The question is here involved of the validity of the appeal procedure established under the provisions of 7 U. S. C. A. 1363-1366 (App. D, infra, pp. 11a-12a).

The effect of the opinion of the Court of Appeals for the Fourth Circuit is to place the Department of Agriculture not simply above the binding effect of its own regulations, but above the clear meaning of the statutes providing appellate procedures both before the Review Committee and in the District Court.

The review procedure which a farmer who is dissatisfied with his crop allotment must follow is prescribed in 7 U.S.C.A. 1363 (App. D, infra, p. 18a). It is provided in Section 1363 that any farmer who is dissatisfied with his farm marketing quota may have such quota reviewed by a local review committee. These provisions have been construed in numerous cases to be mandatory, providing an exclusive remedy, and binding on both the farmer and the Department of Agriculture. *Chandler v. David*, 350 F. 2d 669, 676 (5 Cir. 1965); *Gladney v. Review Committee*, 257 F. Supp. 57, 60 (D.C. La., 1966). In the instant case, no issue was raised as to the right or the power of the Review Committee to maintain jurisdiction of the protest of Drew. Indeed, the question of boundary lines is one in which the Marion County ASC Committee had co-responsibility with the State ASC Committee.

Under the regulations issues by the Secretary of Agriculture, 7 C.FR. 7.20 (f) (App. D, infra, p. 16a), the county committee *shall* "Recommend to the State committee needed changes in boundaries of communities * * *." The State committee by letter advised Drew that he should take up the matter of boundary location with the county committee. (See Appellee Appendix 4A). Not only was there a requirement that the county committee make recommendations as to changes, but the county committee was permitted to do so by the answer filed with the

Review Committee. (See paragraph 3 in answer of Marion County ASC Committee, Appellee's Appendix, p. 3A). The issue of reasonableness of the location of community boundary lines was therefore properly before the Review Committee under the provisions of 7 C.F.R. 711.12 (App. D, infra, p. 17a), where it is provided that "the review committee shall consider only such matters as, under applicable provisions of the act and regulations of the Secretary, are required or *permitted to be considered* by the county committee * * *." (Emphasis supplied). See *Rigby v. Mitchell*, 152 F. Supp. 492 (D.C. Utah 1957) in which the reasonableness of regulations issued by the Department of Agriculture as they affected a wheat farmer's allotment was litigated apparently without question before a Review Committee. The question of arbitrariness and capriciousness was tried before the Review Committee without objection on the part of the Department of Agriculture, but the District Court found that the testimony offered by the Department of Agriculture's witnesses at the hearing before the Review Committee was contradictory and lacking in credibility. *Drew v. Lawrimore*, 257 F. Supp. 659, 665. The District Court found that on the record before it filed in accordance with the provisions of 7 U.S.C.A. 1365 (App. D, infra, p. 11a), the Department of Agriculture's witnesses had offered no testimony to establish any "administrative convenience" which they later endeavored to rely upon. *Drew v. Lawrimore, supr*, page 667. As the opinion in the Court of Appeals points out, the Department of Agriculture does not take issue with the corerctness of the District Court's Order of August 25, 1966, in ordering that the boundary lines for that area of Marion County "should be drawn anew." (Court of Appeals decision, App. A, infra, p. 6a).

The Court of Appeals incorrectly states the question which is at the heart of the matter when it says that defendants ask that "the requirements of efficient administration, and not technical natural resource factors, are to determine the boundary lines for 'local administrative areas' created by Congress to facilitate the administration of the agricultural program." (Court of Appeals decision, App. A, infra, p. 6a). The vital question is whether the Department of Agriculture, after having tried a matter properly before its Review Committee which it concedes was correctly determined adversely to it by the District Judge on appeal, can ignore the record upon which statutory review is based and make a valid administrative determination *dehors* the record.

Again, the provisions of the statute are clear and unambiguous. It is provided in 7 U.S.C.A. 1366 (App. D, infra, p. 11a), that the only way the record filed by the Review Committee may be expanded is upon showing "to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Review Committee * * *." The District Court in its Order dated November 18, 1966, makes specific reference to the binding effect of this statutory provision upon the Department of Agriculture.

> * * * The suggestion of counsel for the defendant that a "trial" should be held in connection with the first cause of action is not tenable. This case is on appeal to this Court under the provisions of 7 U.S.C. 1366. The record on which the appeal is to be heard has been fixed. This court in its previous orders sent the matter back to the defendant Review Committee for the purpose of having it receive additional evidence and make modified findings. Neither at that time nor in

> their answer have the defendants sought to adduce additional evidence nor have they endeavored to satisfy the Court that such evidence is material and that there were reasonable grounds for the failure of the defendants to adduce such evidence in the hearing before the Review Committee held on June 22, 1966. (Appendix for Appellants, p. 57a).

It is well established case law that both the farmer and the Department of Agriculture are bound by the record filed by the Review Committee when appeal is sought under the provisions of 7 U.S.C.A. 1365-1366. *Smith Land Co. v. Christensen*, 148 F. 2d 184 (10 Cir. 1945). It is also well established that the Department of Agriculture must follow the regulations which it has issued for procedure before the Review Committee even though the Department might have the authority to exercise discretion at a later time and revise those regulations. *Kephart v. Wilson*, 219 F. Supp. 801 (D.C. W.D. Texas, 1963).

What the Court of Appeals has done is to confirm the Order of Judge Hemphill in setting aside the decision of the Review Committee but to deny to the District Court the specific powers granted to it by 7 U.S.C.A. 1365, that is, the power of an equity judge, and the powers detailed in 7 U. S. C. A. 1366, that is, "* * *[I]f the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceedings to the Review Committee with directions either to make such determination as the court shall determine to be in accordance with law or to take *such further proceedings, as in the court's opinion, the law requires.*" (Emphasis supplied).

More than this, the Court of Appeals has sanctioned the proposition that the Department of Agri-

culture may go outside the record (as defined in 7 U.S.C.A. 1365-1366) to take additional evidence and statements on issues of fact tried before the Review Committee. The Court gives sanction to this unorthodox procedure on the assumption that the State Committee's determination does not have to be made on a record and is committeed to the discrétion of the Secretary of Agriculture.

It is submitted that the Court of Appeals for the Fourth Circuit has confused the necessity of a "record" when and if the Department of Agriculture were determining community boundary lines as initial matter on its own initiative, and the "record" established before the Review Committee and filed with the District Court in compliance with 7 U.S.C.A. 1365 (App. D, infra, p. 11,), in the words of the statute "the record upon which the determination complained of was made, * * *." There can be no other "record" under the terms of 7 U.S.C.A. 1365. This record must be the one on which the reasonableness of the Department's actions must be judged. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Security & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87; 63 S. Ct. 454, 459; 87 L. Ed. 626 (1943).

The acceptance of the document entitled "Determination in Compliance With the Order of the Court Filed August 25, 1966" (Appellants' Appendix, pp. 28a-42a), violates not only the statute, but the fundamental right of Drew to cross-examine the persons on whom the Department relies in reaching its conclusions.

> * * * Certain principles have remained relatively immuatable in our jurisprudence. One of these

is that where governmental action seriously injures an individual, and the reasonableness of the action depends on the fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., Mattox v. United States, 156 U. S. 237, 242-244, 15 S. Ct. 337, 339-340, 39 L. Ed. 409; Kirby v. United States, 174 U. S. 47, 19 S. Ct. 574, 43 L. Ed. 890; Motes v. United States, 178 U. S. 458, 474, 20 S. Ct. 993, 999, 44 L. Ed. 1150; In re Oliver, 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, but also in all types of cases where administrative and regulatory actions were under scrutiny. E. g., Southern R. Co. v. Commonwealth of Virginia, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Morgan v. United States, 304 U. S. 1, 19, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129; Carter v. Kubler, 320 U. S. 243, 64 S. Ct. 1, 88 L. Ed. 26; Reilly v. Pinkus, 338 U. S. 269, 70 S. Ct. 110, 94 L. Ed. 63. *Green v. McElroy*, 79 S. Ct. 1400, 1413, 360 U. S. 474, 3 L. Ed. 1377 (1959).

See also *Giant Food, Inc. v. F. T. C.*, 322 F. 2d 977 (C.A.D.C. 1963), 116 U. S. App. D.C. 227, Certiorari denied, 84 S. Ct. 1121, 376 U S. 967, 12 L. Ed. 2d 82.

3. A potential conflict exists between various jurisdictions as to the power of the review committees set up under the Agricultural Adjustment Act of 1938, as amended, which should be resolved by the Supreme Court.

Generally the Courts have regarded the question of review in a case of this type from two points of view. The first is, the necessity of beginning with proceedings before the Review Committee as a part of the exhaustion of remedies, the second, the scope of powers of the Review Committee.

An early case reaching the District Court is *Fulford v. Foreman*, 245 F. 2d 145 (5 Cir. 1957), in which the Court discusses the power of the Review Committee to review disparities in cotton allotments between different sections of the State of Texas as established by the State ASC Committee and holds that the Review Committee in such circumstances does not have power to act. In contrast with *Fulford*, the issue here is local and personal. The distinction in the rule as found in *Fulford* is clearly spelled out in *Chandler v. David*, 350 F. 2d 669 (5 Cir. 1965).

In *Chandler*, it was argued that the exclusive mechanism of proceeding through the Review Committee was inapplicable, because the County Committee, although required to make the initial determination whether a transfer of rice allotments was obtained by misrepresentation, did not in substance take any independent action to cancel the allotments. It was argued unsuccessfully upon the authority of *Morrow v. Clayton*, 326 F. 2d 36 (10 Cir. 1963), and *Fulford v. Foreman, supra*, that the Review Committee only has jurisdiction to review bona fide actions of the County Committee, and has no power to supervise the actions of the State Committee. The Court stated

that it took no such narrow view of the review provisions of Section 1363-1366 of Title 7, making clear the distinction between review of local matters upon which the County Committee has acted and statewide administrative policy decisions by the State Committee, as follows:

> * * * The questions presented here are not comparable in scope and impact to those in Fulford v. Foreman, supra, in which action of the state ASCS officials relating to the statewide policy of apportioning acreage allotments among various sections of the state was drawn into question. Instead, the present controversy relates to action which affects only the marketing quotas and acreage allotments of certain individual farmers. As such, it is a matter properly to be considered by the County Committee and reviewed by the Review Committee.
>
> Indeed, we think our decision in the instant case is controlled directly by our earlier decision in Allen v. David, supra. There we asked to review a county committee's cancellation of certain rice allotments prior to exhaustion of the administrative remedy provided by section 363. The action there was induced by the State Committee. We nevertheless held that the right of appeal to the Review Committee had to be exhausted prior to the institution of a proceeding to obtain court review of the agency's action, whether such action was induced, influenced, or instigated by state ASCS officials.
>
> Morrow v. Clayton, supra, is distinguishable. There, the County Committee refused to take any action to cancel the allotments in question, and the State Administrator issued the revised allotment notices himself. In that case, there was no County Committee action which the Review Committee could consider. In addition, that opinion indicates that the cancellations involved may have been part of a statewide policy formulated

by the State officials which the Tenth Circuit believed brought the case within the rationale of Fulford v. Foreman, supra. No similar contention has been advanced here. *Chandler v. David, supra*, p. 677.

In view of the importance of a fair review of the Department's actions to Drew and other farmers and in view of the uncertainty of the procedural routes to be followed, it is submitted that the Supreme Court should review these decisions.

CONCLUSION

The decision below if allowed to stand will seriously undermine the effectiveness of review procedures established by 7 U.S.C.A. 1365 and 1366. There is an uncertainty if not an outright conflict in the decisions of the various Courts of Appeal dealing with these provisions of the law which should be resolved. Substantial economic loss has resulted to petitioner and will result to other farmers under the provisions of the Acreage-Poundage Amendment to the Agricultural Act of 1938, as amended, unless there is clarification of the review procedure. Drew will be denied due process of law if the opinion of the Court of Appeals is allowed to stand, in that he is denied the opportunity to see and attack the evidence which the Department of Agriculture claims will justify a result different from that required by Order of the District Court.

Respectfully submitted.

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